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APR 25 1930

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 870 C/O

FRANK L. SMITH, CICERO J. LINDLY, HAL W. TROVILLION, P. H. MOYNIHAN, WILLIAM BURKHARDT, EDWARD H. WRIGHT and WILLIAM J. SMITH, the persons constituting the Illinois Commerce Commission of the State of Illinois, and OSCAR E. CARLSTROM, Attorney General of the State of Illinois,

AND *Appellants,*

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Appellee,

APPEAL FROM DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION (3746).

NOTICE

and

MOTION BY APPELLANTS TO ADVANCE CASE.

BARNARD & MILLER PRINT, CHICAGO

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vs.

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Appellee,

APPEAL FROM DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION (3746).

NOTICE

To HORACE KENT TENNEY and
WILLIAM D. BANGS,
Solicitors for Appellee:

You are advised that on Monday, the 21st day of April, A. D. 1930, we shall appear before the Supreme Court of the United States, on behalf of appellants, and present

printed motion to advance the hearing of said cause to an early date—copy of which said motion is herewith delivered to you.

Dated, April 16, A. D. 1930.

OSCAR E. CARLSTROM,
Attorney General of the State of Illinois, Solicitor for the members of the Illinois Commerce Commission,
Appellants,

SAMUEL A. ETTELSON,
Corporation Counsel of the City of Chicago,

GEORGE I. HAIGHT,
EDMUND D. ADCOCK,
BENJAMIN F. GOLDSTEIN,
Solicitors for City of Chicago,
Appellant.

Received a copy of the above and foregoing notice, together with copy of motion mentioned therein, this ..... day of April, A. D. 1930.

.....

.....
Solicitors for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. .....

FRANK L. SMITH, CICERO J. LINDLY, HAL W. TROVILLION, P. H. MOYNIHAN, WILLIAM BURKHARDT, EDWARD H. WRIGHT and WILLIAM J. SMITH, the persons constituting the Illinois Commerce Commission of the State of Illinois, and OSCAR E. CARLSTROM, Attorney General of the State of Illinois,

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Appellee,

APPEAL FROM DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION (3746).

MOTION BY APPELLANTS TO ADVANCE CASE.

And now come all said appellants, by their solicitors, and move that a hearing of the said cause be advanced to an early date.

Statement of the matter involved.

Appellants appeal from a final decree, entered on February 28, 1930, by the District Court of the United States, for the Northern District of Illinois, Eastern Division, pursuant to Section 266 of the Judicial Code, enjoining them from enforcing, on grounds of confiscation, the rates for

telephone service in the City of Chicago prescribed by the final order of the Illinois Commerce Commission made August 16, 1923.

This order of the Commission was made as a result of extensive hearings in a proceeding instituted by it on September 13, 1921, and reduced the rates for four classes of coin box telephone service in Chicago as fixed by the Public Utilities Commission (the predecessor of the Illinois Commerce Commission) by Order of December 20, 1920, which is still in force. On December 21, 1923, the District Court granted appellee a temporary injunction upon condition that appellee would agree to refund to its subscribers the amounts paid by them in excess of the sums chargeable under the Order of August 16, 1923, should the relief prayed be finally denied. This fund now aggregates in excess of $11,000,000, exclusive of interest. Upon appeal by appellants, the temporary injunctional order was affirmed by this court on October 19, 1925. (*Smith* v. *Illinois Bell Telephone Co.*, 269 U. S. 531.) The final decree herein, incorporating by reference the court's opinion of January 31, 1930, was entered on February 28, 1930.

The final decree embraces certain findings which we summarize and explain as follows:

1. The court found that the Commission did not give proper consideration to the element of reproduction cost new in valuing the physical property of appellee as of December 31, 1922. The original cost of the physical property (exclusive of working capital, materials and supplies and going value, but inclusive of work in progress) was $94,937,816. Appellee claimed the reproduction cost new of the same property, before depreciation, to be $139,560,146, or an increase of 47 per cent over the original cost. The Commission's valuation of the same property for rate-making purposes was $114,803,128, or an increase of 20.9 per cent over the original cost. The District Court held that

any valuation of the same property was confiscatory which was less than $125,201,802, or an increase of 31.9 per cent over the original cost.

2. The court found that the amount represented by Reserve for Depreciation set up by appellee cannot legally be deducted from the valuation of appellee's property used as a rate base.

3. The court found that the net earnings available for return to appellee on its Chicago investment was confiscatory (citing *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 419, and cases cited in Note 4; *United Railways & Electric Co.* v. *West*, 74 Law Ed. (Adv. Op.) 148. The court disregarded the admitted fact that the Bell Telephone System occupies a unique position because it differs so widely in form of organization and in relation to the public, and the investors, from other enterprises to which it might be expected to be similar. The court refused to take into account the fact that the American Telephone & Telegraph Company has made itself the only permanent investor of the separate operating companies of the Bell System (except for negligible amounts of stock which it could not acquire); that the American Telephone & Telegraph Company admittedly operates the Bell companies, including appellee, without regard to property ownership; that it has attempted to make available to each part of the Bell System all of the profits of the System rather than to make a strict accounting to each company of its operations; that part of the net earnings of appellee available for return on the Chicago investment is admittedly in the possession of the American Telephone & Telegraph Company, the amount of which was not in the record before the court; that the American Telephone & Telegraph Company has made it impossible for appellee to finance separately and apart from the Bell System; that the American Telephone and Telegraph Company has established a standard of financing of

the Bell System on a co-operative basis and as a unit. The court refused to find that the legal adequacy of appellee's net return should be determined, as appellants contended, according to the tests and standards for adequate returns established by the Bell System Companies, including appellee, as a basis for financing their respective operations and upon which tests and standards they are in fact financed.

4. The court found that appellee's compensation from the American Telephone & Telegraph Company for the use of appellee's facilities in the latter's long distance service was fair and reasonable. This finding was based upon the showing by appellee of only a distribution to it of part of the receipts by the American Telephone & Telegraph Company from the long distance business originating in the Chicago Exchange. No distribution was made to appellee from the receipts of the long distance business transacted in but not originating in the Chicago Exchange; no showing was made that the distribution of receipts to appellee took into account the profits of such originating or transacted business, although Section 10 of the Original License Contract of 1881, still in force between the parties, provides that the right of the American Telephone & Telegraph Company to use the property and facilities of the appellee in its own long distance service shall be contingent upon "making a reasonable and suitable division of the tolls and profits of such extra-territorial and through business."

5. The court found that the property and facilities of appellee to be considered as used in the long distance service of the American Telephone & Telegraph Company, and for the use of which appellee was entitled to compensation, did not include that part of appellee's property known as the Local Exchange Plant, or its operation, extending from the subscriber's telephone and from the telephone at the

public pay stations up to and including the Local Exchange (admitted to be not less than 60 per cent of the entire physical property used as a rate base), although as appellants contended, the fundamental and functional physical characteristics of long distance telephone communication between speaker and listener require that each and every part of each circuit from speaker to listener, including the Local Exchange Plant, as a part thereof, be given exclusively to such connection and to the communicating parties during the time interval of their communication.

6. In determining the reasonableness of the compensation paid to appellee for the use of its property and facilities in the long distance service of the American Telephone & Telegraph Company the court employed as the measure of such use the number of calls in that service originating in the Chicago Exchange, without reference to the time consumed in the use of the property per call or operating labor per call.

7. The court found that the act of appellee in leasing its property in Chicago to the American Telephone & Telegraph Company for use in the latter's long distance service between states, and the act of receiving rental by the appellee for the use of such property from the American Telephone & Telegraph Company were acts of interstate commerce over which the Commission and the District Court had no jurisdiction, such rental being paid by the American Telephone & Telegraph Company from the receipts of such long distance service.

8. The court found that appellee could legally include in its depreciation expense for each year since 1921, charges admitted by appellee to be in violation of the Order of the Public Utilities Commission of Illinois entered December 20, 1920, which excessive charges ranged from $1,200,000 to $1,600,000 per year during the period under investigation.

9. The court found that the rule laid down by this Court in *Houston* v. *Southwestern Bell Co.*, 259 U. S. 318, relating to transactions between two companies related through stock ownership was applicable to the transactions between appellee and the American Telephone & Telegraph Company, and not the rule laid down in *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 300, and in *C. M. & St. P. Ry. Co.* v. *Minneapolis Civ. & Com. Assn.*, 247 U. S. 490. In addition to stock ownership by the American Telephone & Telegraph Company the record contains the following classes of evidence not included in the *Houston* case: (a) The Annual Reports of the American Telephone & Telegraph Company from 1881 to date; (b) the complete financial and contractual relationships between the companies from 1881 to date; (c) the historical evolution of the Bell System from 1880 to 1923, by which latter date the Bell System was admittedly operating "practically as a single organization offering telephone service to the people of this country without limitation of distance or property ownership" (Annual Report American Telephone & Telegraph Company of 1923, p. 7); (d) the historical evolution of telephony from the date of the Bell patents in 1876 to date, evidencing the fundamental and functional characteristics of telephone operation within the Bell System by 1917 to be such that admittedly thereafter

> "The American Telephone and Telegraph Company and associate companies constitute one operating entity and to understand or correctly determine the actual costs and charges of the telephone service and the ultimate distribution of the revenue, their accounts must be consolidated." (Annual Report, American Telephone & Telegraph Company of 1916, p. 9; 1918, p. 7);

and (e) the steps taken by the American Telephone & Telegraph Company to control the employes and operations of appellee through (1) the transfer of allegiance of appellee's employes from appellee to the American Telephone & Telegraph Company, and (2) the transfer of departments and various operations of appellee to the American Telephone & Telegraph Company.

Reasons for the application for advancement.

1. The pendency of this case has prevented, since 1923, and now prevents, any further investigation into the rates, revenues and expenses of appellee, as many of the questions which must arise in such investigation are awaiting final disposition of this case.

2. Many issues arising from the relationships between appellee and the American Telephone & Telegraph Company covering revenues, expenses and rate of return awaiting final disposition in this case are also present in every investigation before the Illinois Commerce Commission relating to the proper rates to be charged by appellee in the many communities in the State of Illinois.

3. Disposition of this case should dispose of and settle the controversy as to the proper rules covering the weight to be given to reproduction cost new of property, the propriety of deducting from the valuations of property, for rate-making purposes, the amount included in the reserve for depreciation, and the jurisdiction of State Commissions over the method of determining the amount of depreciation expenses of telephone companies.

4. The difficulty of identifying the subscribers to whom refund must be made, should the final decree be reversed

by this court, is so increasing with time as to tend to render such reversal ineffective as to charges already made.

Respectfully submitted,

P. H. Moynihan,
Frank L. Smith,
Cicero J. Lindly,
Hal W. Trovillion,
William Burkhardt,
Edward H. Wright,
William J. Smith,
Constituting Illinois Commerce Commission, Appellants.

Oscar E. Carlstrom,
Attorney General of the State of Illinois,

City of Chicago,
Appellant,

By Samuel A. Ettelson,
Corporation Counsel,

and George I. Haight,
Edmund D. Adcock,
Benjamin F. Goldstein,
Special Counsel.